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IN THE

Supreme Court Of The United States

October Term, 1995

TURNER BROADCASTING SYSTEM, INC., *et al.*,

Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Reply Brief for Appellant Time Warner Entertainment Company, L.P.

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Faced with the undisputed evidence on remand that the broadcasting industry thrived in the absence of must-carry, Defendants made no effort below, or in this Court, to show "that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry". *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2470 (1994). Thus, this Court should strike down must-carry because the problem it was enacted purportedly to remedy does not in fact exist. Defendants, as they did on remand, seek to save must-carry by positing a new congressional interest: Must-carry, they claim, promotes a "diverse" mix of speech by assuring cable carriage for a small subclass of "weak" or "vulnerable" broadcast stations.[1] But must-carry cannot stand on that interest. As this Court already has held, it is plainly not the interest that Congress posited when it enacted must-carry. *See United States v. Virginia*, Nos. 94-1941, 94-2107, 1996 WL 345786, at *12 (U.S. June 26, 1996) ("[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation"); *Edenfield v. Fane*, 507 U.S. 761, 768 (1993).

Prior to remand, Defendants never argued that must-carry was premised on the protection of marginal broadcast stations, but rather defended must-carry as structural legislation designed to protect the broadcasting industry from economic jeopardy. TWE Br. 9. In concluding that the must-carry provisions are content-neutral, this Court, at the Government's urging, placed special emphasis on Congress' claimed interest in preserving the medium of broadcast television for non-cable viewers. 114 S. Ct. at 2461.[2] Defendants now argue for

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[1] Defendants and their experts identified those stations below as the least watched independent UHF stations in television markets ("ADIs") that already have several other commercial stations, and the least watched noncommercial stations that compete in areas where there are two or three such stations. *See* TWE Br. 19 n.23, 26 n.34 & n.35.

[2] The Government's protestations to the contrary are directly

the protection of particular broadcast stations on the grounds that those stations offer a type of speech that is different from other broadcast stations and especially worthy of protection. That is the precise content-based rationale that five Justices, based on the Government's assurances, found was not Congress' objective. *Id.* at 2461. If this Court even considers Defendants' new congressional interest—a naked preference for a particular type of speech—it must apply strict First Amendment scrutiny, which must-carry most certainly fails.

Beyond the question of the governmental interest at stake (either the interest found by this Court or the one Defendants now advocate), must-carry fails under any standard of scrutiny because even the limited class of broadcast stations Defendants maintain are supposedly at risk—independent UHF stations—thrived in the absence of forced cable carriage, indeed more so than any other subcategory of stations. The record shows that cable operators carry all broadcast stations with any measurable viewership in *non-cable* households (and even a large number of stations without any measurable viewership). TWE Br. 18-20. That fact disproves any claim that must-carry is necessary to preserve the benefits of free over-the-air television for non-cable viewers or that cable operators engage in unfair competition when they deny carriage to certain stations. Defendants' newly-invented theory purporting to show that the least-watched stations are the *most likely* targets of unfair competition is pure speculation, counter-intuitive, and completely unsupported by the record.

Defendants ultimately rest their defense of must-carry on the proposition that it does not infringe much of the cable industry's protected speech. Yet, every alleged "*benefit* to a

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contradicted by the record. *See id.* 2470 ("In defending the factual necessity for must-carry, the Government relies in principal part on Congress' legislative finding that, absent mandatory carriage rules, the continued viability of local broadcast television would be 'seriously jeopardized.' § 2(a)(16). See Brief for Federal Appellees 31-32.").

broadcast station . . . is matched by an *injury* to a cable operator . . . and programmer". J.S. 92a (Williams, J., dissenting) (emphasis in original). Defendants try to create an impression that must-carry has a "negligible" effect by focusing only on the number of must-carry stations *added* after 1992 (not the pre-1992 stations frozen into place) and dividing that number into the total *nationwide* number of channels. As Judge Williams concluded, the "resulting percentages are meaningless as measures of the foreclosure effects of must-carry". *Id.* 91a n.23. Moreover, Defendants' premise—that a law which excises "only" 10% of a speaker's message passes muster because the other 90% is left unrestricted—does not square with this Court's First Amendment precedents.

Finally, even if must-carry were enacted to force cable carriage for weak, little-watched UHF independents, it is ill-tailored to advance that interest. Must-carry grants the right of forced cable carriage to *all* broadcast stations. The record shows that the vast majority of network affiliates—the very mainstream broadcast stations that Defendants assert are irrelevant to any analysis of must-carry—have elected must-carry. TWE Br. 35-36. Likewise, must-carry is poorly tailored to address cable operators' alleged anticompetitive incentives to deny carriage to marginal stations because it generally prohibits non-carriage of *any* broadcast station for *any* reason.

ARGUMENT

I. THE BROADCASTING INDUSTRY'S ECONOMIC HEALTH IS NOT IN JEOPARDY.

This Court held that Congress enacted must-carry because it believed that the "economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry". 114 S. Ct. at 2470.[3] Even if the Government

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[3] The Court's opinion is replete with references to the health of the broadcasting industry: "[The] overriding congressional purpose" is "to

need not show that the entire broadcasting industry will collapse in the absence of forced cable carriage, it cannot take the blunderbuss approach of restricting the speech of all cable operators and programmers without showing that cable poses a real and present threat to that industry. *Id.*[4]

The undisputed record is clear that the health of the broadcasting industry is not in *any* jeopardy at all. The number of broadcast stations increased at record rates in all ADIs from 1985 to 1992 (the non-must-carry period), and by 1992, there were far more broadcast stations in the country than ever before. J.S. 55a-59a (Williams, J., dissenting). As the broadcasting industry was rapidly expanding in the absence of must-carry, the average profit margin of individual broadcast stations also grew at a healthy rate. *Id.* 59a-60a. Broadcasting's advertising revenues remained healthy and tracked the performance of other advertising media. *Id.* 52a-53a.[5] Thus, must-carry must be struck down because the problem it was enacted to redress does not exist.

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guarantee the survival of a medium", *id.* at 2461; "Congress sought to avoid the elimination of broadcast television", *id.*; "Congress concluded that absent a requirement that cable systems carry the signals of local broadcast stations, the continued availability of free local broadcast television would be threatened", *id.*; "Congress granted must-carry privileges to broadcast stations on the belief that the broadcast television industry is in economic peril", *id.* at 2467.

[4] *See also Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, Nos. 95-124, 95-227, 1996 WL 354027, at *25 (U.S. June 28, 1996) (plurality) ("*DAETC*") ("In the absence of a factual basis substantiating the harm and the efficacy of its proposed cure, we cannot assume that the harm exists or that the regulation redresses it.").

[5] The only noticeable decline occurred during 1990, a period of national economic recession. In that year, the total amount spent on advertising across all industries dropped in constant dollars. *Id.* 53a.

II. DEFENDANTS' INVENTED CONGRESSIONAL INTEREST MUST BE REJECTED.

A. Must-Carry Was Not Enacted To Promote The Speech Of Little-Watched UHF Independent Broadcast Stations.

Confronted with the undisputed record of a healthy broadcasting industry, Defendants invent a new congressional interest, arguing that must-carry was enacted to create a "diverse" mix of speech by assuring cable carriage for certain vulnerable (*i.e.*, rarely watched) independent UHF broadcast stations. That argument must be rejected because it was not the interest posited by Congress. The statute on its face does not distinguish between independent and affiliate, unwatched and watched, or UHF and VHF stations. Rather, it applies equally to *all* broadcast stations. Congress' "unusually detailed statutory findings" also look to the broadcasting industry as a whole. 114 S. Ct. at 2461 (citing 47 U.S.C. § 521 notes 2(a)(14)-(16)). Moreover, the congressional record confirms that Congress enacted must-carry "[e]ven for the strongest television stations". S. Rep. No. 92, 102d Cong., 1st Sess. 45 (1991).

This Court held that Congress sought to promote the values associated with the medium of broadcast television (its ability to provide programming to non-cable households) by protecting the broadcasting industry from economic jeopardy, not individual stations or groups of stations. *See* 114 S. Ct. at 2461.[6] If the interest at stake were merely promoting "'the *widest possible* dissemination'" of the programming of those stations that elect must-carry, as Defendants contend (Gov. Br. 15 (emphasis added)), then this Court's remand

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[6] Indeed, this Court described the governmental interests in preventing unfair competition and promoting a diversity of sources of speech as "interrelated" with preserving the viability of broadcasting, not as independent bases for must-carry. *Id.* at 2469.

made no sense. *See* J.S. 62a (Williams, J., dissenting). That interest would be jeopardized if there is *any* "erosion" or "weakening" of broadcast diversity due to *any* decline in the revenues of a broadcast station or *any* decline in the number of broadcast stations available within an ADI. Stripped of its rhetoric, Defendants' defense of must-carry rests on a more-is-better principle, a naked preference for one group of speakers (broadcast stations) over another (cable programmers).[7] Nothing in the Act or this Court's opinion suggests that Congress enacted must-carry merely to provide a statutory subsidy to every broadcast station at the expense of the First Amendment rights of cable operators and cable programmers.

Finally, contrary to Defendants' suggestion, the Act's reference to Section 307(b) supports the conclusion that Congress enacted must-carry to preserve the economic viability of the broadcasting industry. *See* 47 U.S.C. § 521 note 2(a)(9).[8] Section 307(b)'s central purpose—and hence the

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[7] The NAB argues that its newly-created congressional interest does not rest on a more-is-better principle because the number of broadcast stations is fixed by the FCC Table of Allotments. NAB Br. 30-33. That merely proves the point. The Table contains over 2,000 broadcast licenses, hundreds of which have not yet been issued; and the FCC has authority to create additional licenses by expanding the Table. Thus, according to the NAB, Congress enacted must-carry to assure cable carriage for every broadcast licensee that is now or ever will be in existence—and if the FCC saturated the air with licensees, broadcast stations electing must-carry would swamp cable systems.

[8] The NAB argues that must-carry advances the goals of Section 307(b) by assuring cable carriage for *all* broadcast stations and thus preserving the "existing structure" of broadcasting. In support of that argument, the NAB tortures the language of Justice Kennedy's opinion by taking a quote from one page ("Congress' overriding objective", 114 S. Ct. at 2461) and combining it with a quote several pages later ("maintaining the local broadcasting structure", *id.* at 2469). NAB Br. 6-7. Likewise, in quoting language that must-carry protects the "existing structure" of broadcasting, the NAB excludes from its citation this Court's statement that must-carry accomplishes that result by protecting that medium from "unfair competition by cable systems" and, "in particular, [by assuring] that broadcast television remains *available* as *a source* of video programming for those without cable". 114 S. Ct. at 2464 (emphasis added).

FCC's highest priority in allocating broadcast licenses—is assuring that each community receives at least some broadcast service (*i.e.*, a core amount of service).[9] Indeed, Section 307(b) directs the FCC to prevent broadcast stations from oversaturating metropolitan areas and leaving other communities unserved.[10] Thus, Section 307(b) also advances goals related to the medium of broadcast*ing*; it does not, as Defendants contend, seek to give a competitive advantage to marginal broadcast*ers* over other media speakers in television markets with an already abundant supply of over-the-air programming. *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1439 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

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[9] *See* Fed. Defs. Statement in Response to the Order of Sept. 7, 1995 (J.A. 2083-84) ("Defs. Response to Court Order"). The NAB cites *Logansport Broadcasting Corp. v. United States*, 210 F.2d 24, 26 (D.C. Cir. 1954), for the proposition that Section 307(b) is meant to support "maximum television coverage". NAB Br. 8-9. That case is clear, however, that maximum coverage means that each community has broadcast service, not that each community has as many broadcast stations as possible. *Logansport*, 210 F.2d at 25-26 ("The Commission says that it sought to distribute the available channels so as to achieve maximum television coverage with a minimum of interference between stations, and *to that end* assigned *a* television channel or channels to *each* of over 1,000 cities and towns throughout the nation.") (emphasis added).

[10] *See Communications Invest. Corp. v. FCC*, 641 F.2d 954, 964 (D.C. Cir. 1981) ("If left to their own devices broadcasters would congregate around the biggest city in the area. In fact, it was against just this concentration that the current version of section 307(b) was directed.").

B. Defendants' New Congressional Interest Triggers Exacting Scrutiny.

Defendants' new defense of must-carry is plainly content-based. Contrary to Defendants' assertions, this Court did not hold that Congress may discriminate among individual speakers in order to create a diverse market place of ideas or to increase the quantity of speech of a particular group within a medium. 114 S. Ct. at 2467; *see also Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). Rather, this Court held that must-carry's "overriding congressional purpose"—"guarantee[ing] the survival of a medium that has become a vital part of the Nation's communication system" for non-cable viewers—is content-neutral. 114 S. Ct. at 2459-61. By abandoning that content-neutral purpose (protecting the broadcast medium from economic jeopardy) and instead substituting one that is content-based (promoting the "undervalued" speech of marginal broadcast stations to create diversity "*within* that 'unique medium'"),[11] Defendants have abandoned the underpinnings of this Court's decision not to apply strict scrutiny to must-carry. *See id.* at 2461, 2467. Thus, must-carry must be subjected to strict scrutiny if this Court considers Defendants' new congressional interest. There is no dispute that must-carry cannot survive that level of scrutiny.[12]

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[11] Gov. Br. 16 (emphasis in original); *see also id.* at 45 ("broadcast stations other than the most popular . . . add materially to diversity"); NAB Br. 30-32 ("Congress decided that the millions of noncable households should continue to have access to more programming choices than the 'mainstream' options appellants believe would suffice"); Public Br. 25-26 (second or third public broadcast station in a market "often fill[s] special niches by focusing on areas such as instructional programming or programs tailored to minority audiences").

[12] Defendants make the related argument that, by forcing cable operators to carry little-watched broadcast stations, must-carry serves the "paramount" interests of viewers, because "even less popular broadcast stations are indeed valued by the public". Gov. Br. 12 (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)); *id.* at 32. This Court has

In any event, the "essence of [the First Amendment] is that Congress may not regulate speech except in cases of extraordinary need". *DAETC*, 1996 WL 354027, at *9 (plurality). Guaranteeing cable carriage for a small subclass of broadcast stations, even if that were Congress' objective, cannot qualify as one of "extraordinary need".

C. A "Significant" Number Of Broadcast Stations Have Not Substantially Deteriorated Or Failed.

Each Defendant repeatedly quotes the plurality's direction to inquire whether "significant numbers of broadcast stations will be refused carriage" in the absence of must-carry. *See, e.g.*, Gov. Br. 17-18 (citing 114 S. Ct. at 2471). Each, however, excludes from its quotation the very words that define "significant numbers": "necessary to protect the viability of broadcast television". 114 S. Ct. at 2471; *see, e.g.*, Gov. Br. 3, 17-18. As the excluded language indicates, it is simply implausible that the plurality "used 'significant' in a sense completely disembodied from the 'viability of broadcast'". J.S. 68a (Williams, J., dissenting). Thus, the undisputed health of the broadcasting industry disproves any conjecture that a "significant" number of broadcast stations are at risk in the absence of forced cable carriage.

Even if the term "significant numbers" is divorced from any inquiry into the health of the industry overall, and even

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held, however, that cable operators and programmers are full-fledged First Amendment speakers. *Turner*, 114 S. Ct. at 2456. Their First Amendment rights are not subordinate to the rights of other speakers or viewers. *See DAETC*, 1996 WL 354027, at *11 (plurality); *id.* at *55 (Thomas, J., concurring in part and dissenting in part); *Turner*, 114 S. Ct. at 2456-57 (rejecting application of *Red Lion* standard of First Amendment scrutiny). To be sure, the First Amendment advances the interests of viewers, but it does so by restricting the power of the State to dictate who may speak and how much speech is enough. *See International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2711, 2716 (1992) (Kennedy, J., concurring in part).

if Defendants' allegations regarding the number of UHF independent stations denied carriage are taken at face value, Defendants have utterly failed to show that even those stations have "deteriorate[d] to a substantial degree or fail[ed] altogether" because of non-carriage. 114 S. Ct. at 2471. In the absence of must-carry, UHF independent stations grew from 246 stations to 409, more than any other subcategory of stations. Besen Decl. Attach. D., Exh. D-2 (J.A. 929). Those stations experienced some of their greatest increases in years without must-carry: in 1986, for example, over 40 new stations signed on the air. Besen Decl., Exh. 10 (J.A. 860).

Despite this phenomenal growth, Defendants claim that UHF independents are at risk because that growth "quickly fell" to "20 stations per year" in the absence of must-carry. Gov. Br. 33 & n.24. That "slower" growth, however, far outpaced the rate of growth for UHF independents during the 1970s (a decade with must-carry) and for all other categories of broadcast stations during the 1970s, 1980s and 1990s (with or without must-carry in place). Besen Decl., Exh. 10 (J.A. 860).[13] In fact, that growth is particularly impressive given that much of it occurred (1) during the 1990-91 economic recession[14] and (2) after the FCC imposed a freeze

[13] Moreover, UHF stations experienced the same rate of growth (approximately 20 stations a year) in the years immediately prior to must-carry (1990-92) as they experienced in the first full year following its implementation (1994). *Id.* Defendants are only able to create an impression of slower growth by attributing the record growth that occurred during 1985-86 to the FCC's pre-1985 must-carry rules. Gov. Br. 33 n.24. There is no support for that assumption. Defendants attribute the growth that occurred between 1985 to 1987 to must-carry presumably because the FCC's so-called *Century* rules were in effect in 1987. Those rules, however, were in effect for only a short period of time before they were invalidated by the D.C. Circuit. They were also far more limited than the FCC's prior must-carry rules and the current law. In fact, if that growth were attributable to the *Century* rules, it would serve to demonstrate that the current must-carry statute is not narrowly tailored.

[14] During the recessionary period, broadcasting's local advertising revenues—the revenues that Defendants claim are being diverted from independent stations to cable operators—showed the greatest growth rate for the broadcasting industry. NAB, *Advertising Revenues Per Television Household: A Market by Market Analysis* (1991) (J.A. 108) ("local advertising growth showed stronger growth across more market sizes"), *see also TV Digest* (Jan. 7, 1991) (J.A. 111).

on new broadcast licenses in the 25 largest markets.[15] In the end, Defendants, like Judge Sporkin (J.S. 15a), rely on pure intuition and "common sense" that a broadcast station denied carriage will experience financial ruin. This Court has refused to credit such speculation where First Amendment rights are at stake.[16]

[15] *Order*, FCC RM-5811, 1987 FCC LEXIS 3477 (July 17, 1987). Defendants point to an increase in the number of "UHF broadcast channel" vacancies between 1989 and 1991 as evidence of an industry in decline. Gov. Br. 33. Vacant channels, however, are primarily an administrative creation, resulting from the decisions of the FCC. *See* J.A. 2101. Indeed, approximately 40% of all vacant channels (UHF and VHF) between 1989 and 1991 resulted from additional channel allocations by the FCC. Defs. Response to Court Order (J.A. 2093-94, 2098-99).

[16] *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1508-09 (1996) (plurality). Indeed, Defendants can offer at most anecdotal stories of broadcast stations that have experienced financial difficulty. *DAETC*, 1996 WL 354027, at *24, *25 (plurality) ("In the absence of a factual basis substantiating the harm and the efficacy of its proposed cure, we cannot assume that the harm exists"; "anecdotal references" to "isolated instances" of a problem or potential problem cannot support regulation that infringes First Amendment rights). Virtually all of those stories have proven to be exaggerated or untrue. *See TWE Broadcast Station Rebuttal* (June 16, 1995) (J.A. 2264); TWE Reply Mem. in Support of Its Mo. for S.J., Exhs. A & B (June 30, 1995) (J.A. 2243, 2255). The fact that a handful of stations have experienced financial difficulty, filed for bankruptcy, or left the air is an ordinary characteristic of any industry. Besen Decl. (J.A. 836-38); Third Besen Decl. (J.A. 2050). It does not mean that the broadcasting industry (or even its weakest members) are in or anywhere near approaching jeopardy. Moreover, Defendants' experts grossly exaggerate the effect that cable carriage has on the viewership of marginal broadcast stations. McLaughlin Rebuttal Aff. ¶¶ 12-21 (J.A. 2198-2202) (discussing analysis of Defendants' expert Dr. Rohlfs).

D. A "Significant" Number Of Broadcast Stations Have Not Been Denied Carriage.

Even if the Court looks beyond the overall health of the broadcasting industry as a whole and UHF independent stations as a subcategory, Defendants' allegations regarding the number of stations denied carriage are grossly overstated. Defendants continue to rely heavily on the 1988 FCC Carriage Survey to support their claim that cable operators will "take action" against broadcast stations in the absence of must-carry. Gov. Br. 26. As this Court previously recognized, that survey suffers many flaws. 114 S. Ct. at 2471. The Federal Trade Commission ("FTC") reevaluated the FCC's data, and considered many of the variables that were not accounted for by the FCC. J.A. 157.[17] The FTC concluded from the FCC's data that only a small number of broadcast stations reported instances of non-carriage.[18]

Defendants also cite Plaintiffs' expert Dr. Besen for the proposition that, on average, cable systems "denied carriage to 28-31% of broadcast stations", including "39%-40% of UHF independent commercial stations". Gov. Br. 27-28.

Even the Government acknowledges that must-carry cannot assure the survival of stations that "do not engage the attention of the viewing public". Gov. Br. 47; *see also* McLaughlin Aff. ¶¶ 9-18 (J.A. 2175-79).

[17] The NAB (Br. 33) resorts to mischaracterizing the FTC Staff Study as "not even a study of cable systems". The Study specifically states that one of its three information sources is the 1988 FCC Carriage Survey (J.A. 160), and the NAB acknowledged to the district court that the FTC Staff Study "is a re-analysis of FCC survey data", Opp. of NAB and INTV to Pl. Mo. for S.J. at 33 n.18 (June 16, 1995).

[18] The FTC found that 80% of cable operators did not deny carriage to any broadcast stations; 15% denied carriage to only 1 or 2 stations; the average cable operator voluntarily carried 8 to 9 stations; cable operators that denied carriage to a noncommercial station continued to carry about 2 such stations; and the stations denied carriage were primarily distantly located (and duplicated) network signals and relatively low-rated commercial independent stations. J.A. 160-61, 167-74.

When Defendants say 30% of broadcast stations were not carried, however, they mean only that *some* cable systems (out of an average of 53 systems) within the station's ADI did not carry those stations. The fact is that the vast majority of broadcast stations, of any type, are carried on most cable systems. *See* Third Besen Decl. (J.A. 2042-43); FTC Staff Study (J.A. 167) (finding that most stations reporting instances of non-carriage were denied carriage on three or fewer systems within an ADI averaging 53 such systems).[19] Indeed, Defendants' own expert, relying on Dr. Besen's data, reports that the number of stations denied carriage is less than one-third of what Defendants claim in their briefs. Noll Reb. Decl. ¶ 38 (J.A. 1806) ("approximately ten percent of the over-the-air stations").[20]

Defendants' statistics also misrepresent the effect of non-carriage on non-cable subscribers. Broadcast stations typically denied carriage account for a minimal share (approximately

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[19] As Dr. Besen explained: "If there were 10 cable systems and 10 broadcast stations in a particular locale, and each system carried 9 of the 10 stations, I would conclude that the typical system carried 90 percent of the local stations, even though each of the 10 stations could be carried by 9 cable systems." J.A. 2042.

[20] Defendants also rely on their expert Tom Meek. Gov. Br. 26-27 n.16. As our experts show, the data that Meek relies upon is flawed. *See* Second Besen Decl. (J.A. 1818-22); Klein Aff. ¶¶ 34-40 (J.A. 1146-49); McLaughlin Reb. Aff. ¶¶ 9, 27-32 (J.A. 2196, 2205-07). Even assuming that Meek's data is accurate, however, it shows that non-carriage is less than 3% of all instances of voluntary carriage. Second Besen Decl. (J.A. 1818-22). Moreover, none of Defendants' experts try to link a station's failure to achieve a particular level of carriage as a cause of it going "dark". The record shows that very few stations that reported non-carriage in fact experienced financial difficulty and only 15 ever left the air between 1985 and 1992. TWE Broadcast Station Rebuttal (J.A. 2276-80); *see supra* 11 n.16. And even if marginal UHF stations cannot reach 40% of cable subscribers, as Defendants suggest, they still reach, on average, over 70% of *all* television viewers within their ADIs, which is still far better than even the strongest cable programmer.

2%) of all viewership of local stations by *non-cable households* and even a third of those stations are typically carried by cable systems. TWE Br. 19. Thus, in terms of stations that viewers want to watch, there is no dispute that the availability of free television is not jeopardized by the editorial decisions of cable operators.[21]

Finally, contrary to Defendants' representations (Gov. Br. 28-29), their own expert concluded that the percentage of broadcast stations carried by a cable operator is proportionately related to the number of stations available in a particular ADI. Dertouzos Reb. Decl. ¶ 16 & Table A-3 (J.A. 1902, 1905); *see* TWE Br. 19 n.23.[22] In ADIs with an average number of stations (*i.e.*, 6 or 7), virtually all cable operators carry every over-the-air station. Defendants' Fact Response ¶ 7 (Aug. 22, 1995) (first 6 to 7 stations are carried); FTC Staff Study (J.A. 168-69) (8 to 9 stations are carried). Only in saturated markets, where viewers have a wide choice of broadcast outlets, is there evidence of non-carriage. *See* J.S. 72a (Williams, J., dissenting).[23]

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[21] Defendants' contention that Dr. Besen's analysis did not account for the possibility that non-carriage led to low ratings is false. He used ratings data for non-cable households from 1994, which reflected a year and a half of forced cable carriage. Besen Decl. (J.A. 804-06); Third Besen Decl. (J.A. 2047); *see also* McLaughlin Aff. ¶¶ 9-14 (J.A. 2175-78).

[22] Dr. Dertouzos states in a later declaration that "in communities served by only four broadcast stations, almost half of the local cable systems carried fewer than all four stations". Dertouzos Reply Decl. ¶ 11 (J.A. 2016). That conclusion is not only undermined, as shown, by his earlier declaration, but it is based on a sample size of only 15 stations.

[23] The NAB asks this Court to defer to Congress' judgment that cable poses a threat to the broadcasting industry even if no such threat exists, because Congress could "reasonably" conclude from various statements by industry insiders before the FCC that such a threat exists. In effect, the NAB argues that this Court should disregard evidence demonstrating Congress' "predictions" to be patently false. That argument is seriously flawed. "[T]he scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified" if Congress could justify a restriction on speech by "finding" a threat where none is posed. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844 (1978); *see also Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989). This Court has previously rejected the argument that the Court must defer to legislative judgments regarding the need to restrict speech where expert opinions "go both ways". *44 Liquormart*, 116 S. Ct. at 1511. Moreover, although the communications industry is undergoing rapid changes, that is no reason to ignore First Amendment principles. Rather, the Court must take extra care in applying those principles to assure that First Amendment rights are protected. *See DAETC*, 1996 WL 354027, at *10 (plurality).

E. The Broadcasting Industry Is Not At Any Risk Of Future Harm As A Result Of Purported Anti-Competitive Incentives.

The fact that cable operators deny carriage only to the least-watched stations demonstrates that they make editorial decisions based on subscriber preferences. Defendants argue, however, that the least-watched stations are *most likely* to encounter "unfair competition" as a result of supposed anti-competitive "incentives". Gov. Br. 21-26. Defendants' rank speculation about cable operators' incentives is flatly wrong.

First, the broadcast stations Defendants claim are at risk—little-watched UHF independents—have very small advertising revenues. Third Besen Decl. (J.A. 2033, 2035). The possibility that a cable operator would deny carriage to such a station to capture those revenues is highly remote. *Id.* (J.A. 2033-37).[24] Although acknowledging the improbability of their theory, Defendants nonetheless contend that little-watched stations are at risk because cable operators have an incentive to carry cable programmers that offer advertising slots for operators to market ("ad avails"). Gov. Br. 21, 24-25.[25] The record

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[24] *See DAETC*, 1996 WL 354027, at *21 ("this Court has not been willing to stretch the limits of the plausible, to create hypothetical nonobvious explanations in order to justify significant restrictions upon speech").

[25] In fact, Congress believed must-carry was necessary to redress the

establishes, however, that only the most popular cable networks are attractive enough to advertisers to be viable candidates for ad avails.[26] As the Government concedes, however, a cable operator has a substantial *dis*incentive to favor such cable networks over similar broadcast stations because those networks charge nearly twice as much in carriage fees as a cable operator recoups through ad avails. Gov. Br. 24 n.12; *see also* Zipin Aff. ¶ 8 (J.A. 1173). Thus, in its zeal to invent a theory of unfair competition, the Government has simply mischaracterized the record.

Second, even if valid, Defendants' new theory does not add up to a threat to the broadcasting industry. Defendants concede that cable operators will not drop popular broadcast stations because those stations help attract subscriber revenues. Gov. Br. 25 n.14. Likewise, Defendants concede

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perceived market power of cable operators, not to remove an incentive for them to favor those programmers that offer the greatest rates of return. *See, e.g.*, 47 U.S.C. § 521 notes 2(a)(15), (16). Indeed, the only reason that broadcast stations cannot offer ad avails to cable operators (and thus compete openly with cable programmers for carriage) is that the must-carry provisions forbid it. *See* 47 U.S.C. § 534(b)(10). Must-carry cannot be upheld on the ground that it remedies a perceived problem that is itself created by must-carry. *See* J.S. 84a (Williams, J., dissenting).

[26] Thus, contrary to Defendants' suggestion, cable operators do not make carriage decisions based on ad avails from "a less-watched cable network". Gov. Br. 24 n.12. *See* Noll Decl. ¶ 23 (J.A. 1013) ("eight of the ten largest cable networks provide cable operators with at least two minutes per hour"); Dertouzos Rebuttal Decl. ¶ 14 (J.A. 1902) ("[c]able systems rarely market more than 8-12 channels for ad insertion"); Zipin Decl. ¶ 10 (J.A. 1173-74) ("Insertion of commercials requires special equipment for each channel on which ads are inserted. . . . [O]nly the several most popular cable networks are sufficiently attractive to a broad enough base of advertisers to be viable candidates for ad insertion"); *id.* ¶ 12 (J.A. 1174) ("Ad sales revenues are concentrated on a very small group of successful cable networks. Our top 4 services represent more than half of TWC's cable ad revenues."); Kinley Aff. ¶ 12 (J.A. 1131-32) (small operators sell very few ads because of expense); Paul Kagan Assocs., *Cable TV Advertising* (July 28, 1993) (J.A. 253).

that cable operators do not have an incentive to favor popular cable programmers over broadcast stations because those programmers charge high carriage fees. *Id.* 24 n.12.

Finally, Defendants argue that increasing cable advertising revenues portends a future downturn for broadcasting. Gov. Br. 22-23. The record is undisputed, however, that cable operators account for a very small percentage of available advertising revenue and that technical problems limit their ability to compete with broadcasting for that revenue.[27] The increases that do occur appear large in percentage terms because cable's total advertising revenue is so low. J.S. 52a-53a (Williams, J., dissenting). Moreover, cable operators face increasing competition from direct broadcast satellite ("DBS") and local telephone companies, which also dispels any prediction of a future threat from cable's perceived market power. Besen Decl. (J.A. 828-29); *see also DAETC*, 1996 WL 354027, at *10.[28]

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[27] TWE Br. 22-25. The NAB itself discounts any threat posed by cable to broadcasting's dominance over local advertising. *See* NAB, *Television in Transition* (Apr. 1989) (J.A. 73-97).

[28] Defendants supplement their new theory of "unfair competition" with another theory regarding vertical integration. Must-carry, however, is not designed to remedy perceived problems arising from vertical integration. *See* H.R. Rep. No. 628, 102d. Cong., 2d. Sess. 173 (1992) ("The full committee rejected must-carry as a remedy to speculative allegations of program discrimination") (additional views). Indeed, Congress enacted separate provisions that, unlike must-carry, are expressly intended to address vertical integration issues. *See, e.g.*, 47 U.S.C. § 533(f)(1)(B); 47 C.F.R. § 76.504. Moreover, whatever incentive cable operators have to favor affiliated programmers, there is no evidence that it will threaten the broadcasting system. Defendants contend only that cable operators will favor affiliated programmers that are "the closest substitutes" for certain little watched broadcast stations (Gov. Br. 19), narrowing the perceived problem to those "niche" broadcast stations that provide programming similar to cable programmers.

III. THE MUST-CARRY PROVISIONS UNDULY RESTRICT SPEECH.

Defendants are simply wrong that must-carry does not restrict "much" speech. First, must-carry overrides cable operators' editorial discretion—a function at the heart of the First Amendment. Second, must-carry directly forecloses between 7% and 13% of the average cable operator's limited channel capacity, forever preventing that operator from providing its desired speech on those channels. The must-carry provisions cannot pass First Amendment scrutiny on the grounds that they restrict speech "only" 10% of the time.[29] Moreover, cable operators and programmers are suffering harm at the hand of the State. As such, their injury is different in kind for First Amendment purposes from the harm allegedly suffered by broadcast stations—who have no First Amendment right of access to cable systems—as a result of the editorial choices of cable operators.

IV. THE MUST-CARRY PROVISIONS ARE NOT NARROWLY TAILORED.

There is no "fit" between the must-carry provisions and Defendants' newly-asserted interest. The provisions do not distinguish between weak stations and healthy stations, between network affiliates and independent stations, between VHF and UHF stations, or between stations with high ratings and low ratings. Rather, they allow *every* broadcast station to elect forced cable carriage, including cable's "*strongest* competitors (the network affiliates)". Gov. Br. 25 n.14

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[29] 114 S. Ct. at 2456-57 (rejecting application of *Red Lion* standard to must-carry); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality) ("[t]he loss of First Amendment liberties, for even minimal periods of time, unquestionably constitutes irreparable injury"); *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place").

(emphasis in original). *See* McLaughlin Aff. ¶ 8 (J.A. 2175) (stations added to Time Warner's systems under must-carry are not in serious financial difficulty).[30] Likewise, must-carry is not targeted at a cable operator's perceived incentives to increase advertising revenues or favor affiliated programmers.[31] Defendants simply do not explain why Congress never even considered the self-evident less restrictive alternative—limiting must-carry to the very stations that are allegedly in need, little-watched UHF independents.

V. THE TAKINGS CLAIM MUST BE REMANDED.

Judge Sporkin dismissed Time Warner's takings claim so it could be refiled "before the appropriate forum", J.S. 28a, but he never decided whether 47 U.S.C. § 555(c)(1) precluded that claim from being raised before any other forum but the district court. Far from contending otherwise, the Government, following Judge Sporkin's strategy of avoidance, argues that Time Warner cannot raise its claim before this Court. This

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[30] The Government wrongly contends that Time Warner "identified only 29 stations that supposedly fall within the category of undeserving profitable broadcasters that have ever elected must-carry". Gov. Br. 39. As explained in our merits brief (Br. 35-36), hundreds of stations that are not marginal or in need of forced cable carriage (including approximately 75% of network affiliates) have elected must-carry, many to expand greatly the reach of their over-the-air signals. Indeed, Defendants contend that well over 50% of all stations carried on cable systems elect must-carry, Peterman Decl., Exh. 2 (J.A. 1152), although only 10% are allegedly in need of forced carriage, Noll Reb. Decl. ¶ 38 (J.A. 1806).

[31] The Government suggests that must-carry is narrowly tailored to address perceived problems arising from vertical integration because "cable systems serving 70% of the nation's cable subscribers are vertically integrated". Gov. Br. 20. If vertical integration is the problem, then enacting provisions that apply only to the vertically integrated is an obvious less restrictive alternative to must-carry. *See, e.g.*, 47 U.S.C. § 548 (regulating vertical integration between cable programmers and operators); *DAETC*, 1996 WL 354027, at *19 ("[a]lthough we . . . do not, decide whether the new provisions are themselves lawful (a matter not before us), we note that they are significantly less restrictive").

Court should reverse and direct the district court to decide (one way or the other) whether it has exclusive jurisdiction over Time Warner's takings claim.[32] Judge Sporkin's ruling threatens to leave Time Warner with no forum in which to seek relief on a meritorious claim. That ruling is properly framed for this Court's review and is clearly erroneous.[33]

CONCLUSION

The judgment of the district court should be reversed.

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Respectfully submitted,

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[32] In a direct appeal from a three-judge district court, this Court has jurisdiction over the whole case, *see Fusari v. Steinberg*, 419 U.S. 379, 389 n.13 (1975); thus, its consideration of a case is not limited by the requirements for a petition for a writ of certiorari, *see* Sup. Ct. Rule 18(3) (requiring jurisdictional statement to follow only the "form" of petition).

[33] The Government also frivolously suggests that Time Warner's First Amendment challenge to the low power carriage obligations and market modification provisions (TWE Br. 47-48), which provide special must-carry rights based on the content of speech, are not properly before this Court. Those provisions are part of Section 4 of the Act. Indeed, this Court expressly directed the district court to rule on those provisions. 114 S. Ct. at 2460 n.6. By failing to defend those provisions, the Government has conceded that they are indefensible.